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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 247

JANEL SALES CORP.,
Petitioner,

v.

PARKE, DAVIS & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting Writ	5
Conclusion	7
Appendix A—15 U.S.C. Sec. 1	App. A1
Appendix B—15 U.S.C. Sec. 45	App. B1
Appendix C—Findings of Fact, Conclusions of Law and Judgment	App. C1
Appendix D—Opinion	App. D1
Appendix E—Judgment of Court of Appeals	App. E1
Appendix F—Petition for Rehearing (In Banc) by Defendant-Appellant	App. F1
Appendix G—Order Amending Opinion and Denial of Petition for Rehearing	App. G1
Appendix H—Denial of Petition for Rehearing In Banc	App. H1
Appendix I—Order Denying Petition for Rehearing In Banc	App. I1

TABLE OF AUTHORITIES

Cases: PAGE

Esso Standard Oil Co. v. Secatore's, Inc., 246 F.2nd 17 5

United States v. McKesson & Robbins, 351 U.S. 305 ..... 5, 6

Statutes:

Feld-Crawford Act (New York General Business Law 369-a-b) 3

McGuire Act (15 U.S.C. Sec. 45) 3, 4, 5, 6, 7

Miller-Tydings Amendment to the Sherman Act (15 U.S.C. Sec. 1) 3, 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Janel Sales Corp. respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 19, 1964 (Appendix E, infra). On April 8, 1964, orders were entered denying Petition for Rehearing and Rehearing in Banc (Appendices G and I, infra).

Opinions Below

The opinion of the Court of Appeals affirming the Judgment of the Trial Court (Appendix D, infra) is reported at 328 F. 2nd 105, and the order amending the opinion and the denial of Petition for Rehearing (Appendix G, infra) is not yet officially reported.

Jurisdiction

An order denying rehearing (Appendix G, infra) was entered by the Court of Appeals for the Second Circuit on April 8, 1964. By decision of April 8, 1964 (Appendix H, infra) the Court denied the petition in banc and an order was entered on April 8, 1964 (Appendix I, infra).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether the Miller-Tydings and McGuire Act exemptions to the Sherman Act and Federal Trade Commission Act permit a producer, who engages in direct sales to certain classes of consumers, to utilize resale price maintenance contracts to control the prices of competing retailers.

2. Whether the Miller-Tydings and McGuire Act exemptions to the antitrust laws permit the enforcement of Fair Trade contracts between persons and firms in competition with each other.

3. Whether the McKesson & Robbins limitation on the scope of the exempting statutes Miller-Tydings and McGuire Act applies to a producer who admittedly sells in competition with retailers upon whom such producer imposes the sanctions of state Fair Trade laws.

Statutes Involved

The pertinent provisions of the Miller-Tydings amendment to the Sherman Act (15 U.S.C. Sec. 1) are set forth in Appendix A, infra, and the pertinent provisions of the McGuire Act (15 U.S.C. Sec. 45) are set forth in Appendix B, infra.

Statement

Janel Sales Corp., hereinafter called Janel, operates a retail drug store at 488 Seventh Avenue in New York City. Janel sells certain drug products bearing the brand names and trademarks of Parke, Davis & Company, hereinafter called Parke, Davis, plaintiff-appellee below and respondent here.

Parke, Davis fair trades its products at retail in New York pursuant to the Feld-Crawford Act (General Business Law 369-a-b). Janel sold certain of said products at prices below the minimum prices established by Parke, Davis after having received notice of Parke, Davis' Fair Trade contracts and minimum retail price schedules.

Parke, Davis filed its Fair Trade enforcement action against Janel in June, 1961 in the U.S. District Court for the Southern District of New York and pro-

cured a temporary injunction. Janel pleaded in defense that Parke, Davis Fair Trade contracts and the enforcement thereof were unlawful, and not within the scope of the Miller-Tydings or McGuire exemptions for the reason that plaintiff itself engaged in retailing by making direct sales to certain classes of consumers in competition with Janel. Thus, the McKesson & Robbins limitation of the scope of the Miller-Tydings and McGuire exemptions constituted Janel's defense.

After trial before United States District Judge Palmieri in June, 1963, findings of fact, conclusions of law and Judgment were entered against Janel (Appendix C, infra).

The evidence on the issue of Parke, Davis' competition at the same functional level with Janel was submitted and received by the Court, in part reflected by the findings of fact, was to the following effect:

(1) That Parke, Davis made direct sales to certain classes of consumers, notably doctors, clinics, veterinarians and business firms.

(2) That Parke, Davis customarily paid New York sales tax on these sales.

(3) That these sales were very often in very small quantities, many of them being between $1 and $10.

(4) That these direct customers of Parke Davis also purchased other of their drug needs from retail druggists.

An appeal was then taken to the U.S. Court of Appeals for the Second Circuit in which the details of Parke, Davis' sales at the same functional level as

Janel were urged on the Court. On February 19, 1964 the Court of Appeals for the Second Circuit affirmed the Judgment of the District Court (Appendix D). A Petition for Rehearing before the Court of Appeals for the Second Circuit was denied on April 8, 1964 (Appendix G, infra).

Reasons for Granting Writ

The Court of Appeals for the Second Circuit failed to follow the rule of this court, *United States* v. *McKesson & Robbins*, 351 U.S. 305. Instead the Court of Appeals reasoned that the direct sales by Parke, Davis were not to be characterized as retail sales, and since defendant was a retailer, its defense of the McKesson & Robbins limitation was not made out.

This places the Second Circuit Court of Appeals in its interpretation and application of the McKesson & Robbins' ruling in conflict with the decision of the Court of Appeals for the First Circuit in *Esso Standard Oil Co.* v. *Sciatore's, Inc.*, 246 F. 2nd 17.

It is of import to the business community generally that a clear line of demarcation between the permissive and unlawful be established as to the enforcement of Fair Trade contracts. It is the position of petitioner Janel that the clear language of the McGuire amendment does not authorize or exempt Fair Trade contracts enforced as between retailers, or as enforced between persons, firms and corporations doing business at the same functional level.

The pertinent provisions of the McGuire amendment appear in Subsection 5 as follows:

"Nothing contained in paragraph (2) of this sub-

section shall make lawful contracts * * * between retailers * * * or between persons, firms and corporations in competition with each other."

Thus it is urged here as was urged below that the characterization of Parke, Davis' sales as sales other than at retail is not dispositive; and if the sales by Parke, Davis are at the same functional level as those of Janel, the *McKesson & Robbins* doctrine makes the Fair Trade contracts of Parke, Davis unenforceable and indeed affirmatively unlawful.

It must be remembered that we are here dealing with a general national policy adverse to the institution of resale price maintenance in the form of Fair Trade or otherwise. As against this clear-cut and long-established national policy there is a specific statutory exemption set out, for all practical purposes in the McGuire Act. This Court has heretofore frequently admonished that resale price arrangements are unlawful except as the seller moves along the narrow route established by the exempting statutes.

In *McKesson & Robbins* this court defined the limitation of the statutory exemption to the general antitrust policy that is inimical to the practice of resale price maintenance. The Court of Appeals' decision in this case in turn erroneously limits the application of *McKesson & Robbins*.

The Court of Appeals for the First Circuit has correctly applied the substance of the *McKesson & Robbins* doctrine in their *Secatore* decision. There the sales in question were to certain fleet taxi and truck operators. The Court emphasized that the sales

to the fleet operators were also frequently made by filling stations, such as defendant Secatore.

There seems to be no reason why the scope of the McGuire Act exemptions should be interpreted one way in the First Circuit and another way in the Second. The very fact that Parke, Davis exempted the challenged category of sales from the operation of its Fair Trade Agreements makes compelling the conclusion that Parke, Davis regarded its own sales to this class of customer as being in competition with retailers such as Janel. This is not a case where judgment turns on disputed issues of fact; it is rather a matter of the application of correct legal principles to agreed facts. See findings of fact of the Trial Court Nos. 8, 9, 12, 14, 20 and 21 (Appendix C infra).

Conclusion

For the foregoing reasons it is respectfully urged that this Court issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

HERMAN YOUNG
Counsel for Petitioner

APPENDIX A

15 U.S.C. Sec. 1

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers or between wholesalers, or between brokers, or between factors, or between

retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U. S. Code, Sec. 1.)

APPENDIX B

15 U.S.C. Sec. 45

Sec. (a) (2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each others.

APPENDIX C

Findings of Fact, Conclusions of Law and Judgment

Findings of Fact and Conclusions of Law

PRELIMINARY STATEMENT

PALMIERI, *J.*

This is an action for injunctive relief by a manufacturer and distributor of pharmaceutical drugs, medicines and related commodities against the operator of a drug store adhering to the so-called "discount" or "cut-rate" sales policy. The action is based on the Miller-Tydings Amendment of Section 1 of the Sherman Act (15 U.S.C. § 1), the McGuire Amendment of the Federal Trade Commission Act (15 U.S.C. § 45), and the Feld-Crawford Act (N. Y. Gen. Bus. Law §§ 369-a—e).[1]

[1] The Miller-Tydings Act, 50 Stat. 693, exempts from the provisions of the Sherman and Federal Trade Commission Acts agreements that prescribe minimum prices for the resale of trademarked commodities in free and open competition with commodities of the same class produced by others, where such contracts are valid under applicable state law. Immunity under the antitrust acts is extended by the McGuire Act, 66 Stat. 632, to the exercise or enforcement of rights under state law against non-signers of such agreements who wilfully and knowingly sell or advertise for sale below the fair trade price. Neither of these Acts validates resale price maintenance agreements:

> between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

The pertinent sections of the Feld-Crawford Act provide as follows:

> Sec. 369-a. 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears,

Findings of Fact and Conclusions of Law

The plaintiff has engaged in extensive advertising and promotion designed to create good will for its products and its trademarks among physicians, veterinarians, pharmacists and consumers. To protect its good will and the retail druggists upon whom it is dependent for distribution, plaintiff has entered into fair trade contracts with its retail drug customers thereby establishing fair trade minimum prices for its products. There was sufficient evidence to establish that plaintiff maintained a vigorous, adequate and non-discriminatory enforcement policy with respect to its fair trade price structure. It was also established that defendant, after appropriate warning, continued to sell products of plaintiff's manufacture for less than the established fair trade prices, thus engaging

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the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Sec. 369-b. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

in actionable conduct notwithstanding the absence of a fair trade agreement between the parties.[2]

The defendant's position, which I find has not been sustained, rests largely upon contentions that the plaintiff is engaged in the retail business in competition with those signing its fair trade contracts, and that it is violating the antitrust laws by "price fixing" and by pursuing a course of conduct incompatible with the antitrust laws and the policy of free competition enunciated by them.

The Findings of Fact and Conclusions of Law which follow are intended to demonstrate that the plaintiff is entitled to the injunctive relief which it seeks.

Findings of Fact

1) Plaintiff is a Michigan corporation, having its principal office and place of business located in that state. The defendant is a New York corporation, having its principal office and place of business located in that state. The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

2) Plaintiff is engaged in the manufacture, production, sale and distribution of ethical drugs, medicines, preparations and other commodities.

3) Each product manufactured and sold by plaintiff bears one or more of its trademarks including product

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[2] N. Y. Gen. Bus. Law § 369-b. See *Johnson & Johnson* v. *Janel Sales Corp.*, 192 F. Supp. 780 (S.D.N.Y. 1961); *Johnson & Johnson* v. *Avenue Merchandise Corp.*, 193 F. Supp. 282 (S.D.N.Y. 1961).

marks such as ABDEC, MYADEC, PALADAC affixed to the products themselves and to cartons in which such products are packaged.

4) For a number of years, plaintiff has been engaged in an extensive and continuous program of advertising on local and national levels. Its current expenditure for advertising is $2,000,000 per annum and during the past five years it has spent upwards of $10,000,000 for such advertising.

5) Retail druggists rely upon plaintiff's good will and promotion activities to move plaintiff's products from their shelves. Plaintiff in turn relies upon the retailers as an effective link in the chain of distribution for its products to the public.

6) The products manufactured and sold by plaintiff including ABDEC Vitamin drops, MYADEC Vitamins and PALADAC Vitamin preparation, are the same as or similar to in composition and pharmacological action and are sold for substantially the same prices as products of other manufacturers, among whom are The Upjohn Company, E. R. Squibb Division of Olin Mathieson Company, Mead Johnson & Company and others.

7) ABDEC Vitamin Drops are the same as or similar to Abbott's "Vi-Daylin", Upjohn's "Zymadrops", Mead Johnson's "Poly-Vi-Sol", Endo's "Vifort" and others. MYADEC Vitamin capsules are the same as or similar to Squibb's "Theragram", Upjohn's "Zymacaps" and others; PALADAC liquid vitamin preparation is the same as or similar to Abbott's "Vi-Daylin"

liquid; Endo's "Vifort" nectar; Lederle's "Vi-Tyke" Syrup and others. Other products bearing plaintiff's trademarks are the same as or similar to products of other pharmaceutical and drug manufacturers.

8) Plaintiff sells its products to wholesale druggists, retail drugstores, hospitals, veterinary hospitals, industrial clinics and other manufacturers and processors.

9) Plaintiff sells only to those industrial clinics and dispensaries that are under the supervision of a physician.

10) Plaintiff is licensed by the New York Board of Pharmacy to sell drugs at wholesale.

11) Plaintiff has entered into fair trade contracts with retailers in the State of New York under which it has established minimum prices for the retail sale of products bearing its name and trademark. All of such contracts are in the form of plaintiff's Exhibit 4. Defendant has not entered into a fair trade contract with plaintiff.

12) Paragraph 7 of plaintiff's fair trade contract with retailers exempts from its provisions sales by retailers to hospitals or clinics, physicians or agencies of the federal, state, county or municipal governments or state supported educational institutions.

13) A clinic is a place where people who are ill are treated as distinguished from a hospital which provides facilities for overnight care.

14) Veterinarians operate animal hospitals in conjunction with the practice of their professions.

15) Plaintiff has when necessary brought enforcement actions to eliminate price violations by retailers in the State of New York and has uniformly and diligently enforced its retail fair trade program.

16) Defendant operates a retail drugstore at 488 Seventh Avenue, New York, New York, in which it sells at retail the products of plaintiff and those of other drug and pharmaceutical manufacturers.

17) Defendant has been notified of the stipulated minimum retail prices for plaintiff's products and was particularly warned by letter of April 12, 1961 of its price cutting activities.

18) Defendant has offered for sale and sold at retail products bearing plaintiff's name and trademarks at prices below those established by plaintiff with retail druggists in the State of New York.

19) The effect of price cutting by defendant on products of plaintiff causes competing retailers to cease promoting or selling the products and reduces the sales of plaintiff.

20) Some veterinarians buy drugs and supplies for their veterinary hospitals only from drug manufacturers and veterinary jobbers and some buy drugs in small quantities from retail drugstores only in emergencies.

21) Plaintiff is not engaged in the retail drug trade and does not sell its products in competition with retailers who have signed its fair trade contracts or with the defendant. The fact that plaintiff paid New York City sales taxes on some of its goods is insufficient to establish that plaintiff is engaged in the retail trade.

22) There is a lack of proof that plaintiff's sales of prescription items have been made at less than fair trade prices.

CONCLUSIONS OF LAW

1) The products manufactured and sold by plaintiff are in fair and open competition with products of a number of other pharmaceutical and drug manufacturers. *General Elec. Co. v. S. Klein-On-The-Square, Inc.*, 121 N.Y.S. 2d 37, 50 (Sup. Ct. 1953); *Eastman Kodak Co. v. Seigel*, 2 Misc. 2d 966, 969-70, 150 N.Y.S. 2d 99, 104 (Sup. Ct. 1956); *Columbia Records, Inc. v. Goody*, 278 App. Div. 401, 105 N.Y.S. 2d 659 (1951).

2) Plaintiff's fair trade contracts with retailers in New York are within the exemption of the Miller-Tydings Act and the McGuire Act and are not invalid under the Sherman Antitrust Act. *Parke, Davis & Co. v. Rocket Drugs, Inc.*, 214 F. Supp. 937 (S.D.N.Y. 1963); *Upjohn Co. v. Liberty Drug Co.*, 193 F. Supp. 701 (S.D.N.Y. 1959); *Johnson & Johnson v. Arcuni Merchandise Corp.*, 193 F. Supp. 282 (S.D.N.Y. 1961); *Johnson & Johnson v. Apollo Sales, Inc.*, 192 F. Supp. 779 (S.D.N.Y. 1961).

3) Defendant has wilfully and knowingly sold at retail products bearing plaintiff's name and trademarks for less than the retail fair trade prices established by plaintiff.

4) Immediate, substantial and irreparable harm to the good will of plaintiff and to the business of the retailers who handle plaintiff's products now exists by reason of the acts of defendant and is likely to continue. *Calvert Distillers Corp.* v. *Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 347, 2 N.Y.S. 2d 320, 325-26 (Sup. Ct. 1938); *Bristol-Myers Co.* v. *Picker*, 302 N. Y. 61, 96 N. E. 2d 177 (1950); *Chester Hill Pharmacy, Inc.* v. *Westchester Union Drug Plan, Inc.*, 1958 Trade Cas. ¶ 69,092 (N. Y. Sup. Ct. 1958); *Marsh* v. *White of Massapequa, Inc.*, 1958 Trade Cas. ¶ 68,992 (N. Y. Sup. Ct. 1958).

5) Plaintiff is entitled to an injunction enjoining defendant, its agents, attorneys, employees, servants, representatives and any and all persons acting by or under their authority from advertising, offering for sale or selling at retail merchandise bearing plaintiff's name or trademarks for prices less than those stipulated in plaintiff's fair trade contracts and current supplements thereto in effect with retailers in the State of New York. N. Y. Gen. Bus. Law §§ 369-a, 369-b.

SUBMIT PROPOSED JUDGMENT ON NOTICE.

Dated: New York, N. Y., July 1963.

EDMUND L. PALMIERI
U. S. D. J.

Judgment of District Court

THIS CAUSE having come on for trial before the Honorable Edmund L. Palmieri, without a jury, the parties having appeared by their respective counsel and the issues having been duly tried, and the Court having filed its opinion on the 16th day of July, 1963, directing judgment for plaintiff upon the findings of fact and conclusions of law set forth therein, it is hereby

ORDERED, that defendant, its agents attorneys, employees, servants, representatives and any and all persons acting by or under their authority, are hereby restrained and enjoined from advertising, offering for sale or selling at retail merchandise bearing plaintiff's name or trade-marks for prices less than those stipulated in plaintiff's fair trade contracts and current supplements thereto in effect with retailers in the State of New York, and from otherwise violating the terms and conditions of said fair trade contracts.

Dated: New York, N. Y., July 31, 1963.

EDMUND L. PALMIERI,
U. S. D. J.

Judgment entered 8 19 63.

JAMES E. VALECHE,
Clerk.

APPENDIX D

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 223—September Term, 1963.

(Argued December 10, 1963

Decided February 19, 1964.)

Docket No. 28532

PARKE, DAVIS & COMPANY,

Plaintiff-Appellee,

v.

JANEL SALES CORP.,

Defendant-Appellant.

Before:

CLARK,* SMITH and HAYS, *Circuit Judges.*

Appeal by defendant from judgment of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *District Judge*, restraining the advertising, offering for sale or sale at retail of plaintiff's products below "fair trade" prices. Affirmed.

GEORGE M. CHAPMAN, New York, N. Y. (Charles D. Snead, Jr., and Rogers, Hoge & Hills, New York, N. Y., on the brief), for plaintiff-appellee.

* Judge Clark heard argument in this case, but died before this opinion was prepared.

HERBERT PLATT, New York, N. Y. (Charles E. Scribner, and Scribner & Miller, New York, N. Y., on the brief), for defendant-appellant.

PER CURIAM:

In this action by a drug manufacturer to enjoin sales of drugs and related products by a retail drug store below so-called fair trade prices, the District Court for the Southern District of New York, Palmieri, J., found practices by defendant, a nonsigner of the fair trade agreements, in violation of the Miller-Tydings Amendment of Section 1 of the Sherman Act, 15 U. S. C. §1, the McGuire Amendment of the Federal Trade Commission Act, 15 U. S. C. §45 and the Feld-Crawford Act, N. Y. Gen. Bus. Law 369-a-6, and issued the injunction as prayed, a claim for money damages having been waived. Defendant appeals, contending primarily that findings were clearly erroneous that plaintiff was not engaged in retailing. If it had been, this would have made its fair trade contracts agreements between retailers and with competitors and so not exempted from Sherman Act prohibitions by the so-called fair trade amendments. We find no error in the findings and affirm the judgment.

The principal issue on this appeal is whether sales by plaintiff to clinics and veterinarians, under provisions of its fair trade contract with retailers exempting sales by retailers to hospitals, clinics, physicians and other named agencies were sales at retail which would deprive plaintiff of the protection of the so-called "fair trade" acts. But there provisions, for the benefit of the retailers, were no restriction on the manufacturer. And neither those provisions nor

any other proof offered, made Parke Davis' sales to hospitals, clinics and veterinarians sales at retail in competition at retail with its retail customers. Retail sales include "all marketing transactions in which the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity . . . purchased." *Roland Electric Co.* v. *Walling*, 326 U.S. 657, 674. In a business such as plaintiff's, this appears a more apt definition than one relying solely on the quantity of goods sold. These were not sales to ultimate consumers for their own use or the use of their families. The fact that Parke Davis paid New York City sales tax on some items was not an admission that they were sales at retail, for the sales tax reaches transactions other than those usually considered retail sales, i.e., rentals by plaintiff to Pfizer of encapsulating machines.

Finally, appellant contends that denial of a continuance to take additional depositions was reversible error. The refusal of further adjournment, June 7, 1963 when the trial date had been set, in a not overly complicated case in which discovery had commenced on July 13, 1961, was well within the court's discretion.

APPENDIX E

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of February one thousand nine hundred and sixty-four.

Present:

HON. J. JOSEPH SMITH

HON. PAUL R. HAYS

Circuit Judges.

PARKE, DAVIS & COMPANY,

Plaintiff-Appellee,

v.

JANEL SALES CORP.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

Endorsed:

United States Court of Appeals
Second Circuit

Filed February 19, 1964

A. DANIEL FUSARO,
Clerk

APPENDIX F

Petition for Rehearing (*in Banc*) by Defendant-Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28532

PARKE, DAVIS & COMPANY,
Plaintiff-Appellee,

v.

JANEL SALES CORP.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING *(IN BANC)* BY DEFENDANT-APPELLANT

SAM H. LIPSON,
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Attorney for Defendant-Appellant-Petitioner.

App. F 2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28532

PARKE, DAVIS & COMPANY
Plaintiff-Appellee,

v.

JAMES SALES CORP.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING (*IN BANC*) BY DEFENDANT-APPELLANT

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Petitioner, Janel Sales Corp., defendant-appellant, respectfully presents this Petition for a Rehearing *in banc*, pursuant to Rules 25(a) and 25(b) of the Rules of this Court for the following reasons:

1. This Petition cannot be "addressed to the court as constituted in the original hearing" as provided by Rule 25(b) of the Rules of this Court for the reason that Judge Clark, who with Judge Smith and Judge Hays originally constituted the panel that heard the argument, is now dead.

2. As Judge Clark heard the argument in this matter, but died before the Opinion was prepared, it was an erroneous and prejudicial exercise of jurisdiction for the remaining two members of the panel to proceed with the consideration and determination of this matter.

3. The appeal to this Court was largely predicated on challenges to the findings of fact in the District Court and the legal characterization of such facts. This Court's Opinion demonstrates that the primary issue relied upon by defendant-appellant was misconceived by this Court, for it is legally irrelevant whether the contractual exemptions of plaintiff-appellee's Fair Trade Contracts were restrictions on the manufacturer, or for whose benefit such contractual provisions inured.

4. Under the doctrine of *U. S.* v. *McKesson & Robbins*, 351 U. S. 305, and *Esso Standard Oil Co.* v. *Secatore's Inc.*, 246 F. 2d 17, it is immaterial whether the retail sales made by the fair trader are in direct competition with the party against whom enforcement is sought. It is enough if the parties to the lawsuit are competing at the same functional level.

5. The Opinion of the Court misapprehends the principal issue of the appeal. It was not "whether sales by plaintiff to clinics and veterinarians * * * were in violation of the Act." The principal issue was whether sales by plaintiff of single items to an advertising agency, a meat packer, an insurance company, especially where no doctor was in attendance, were sales at retail, where the entire circumstances, including the payment of retail sales tax on these

items together with a multitude of small transactions, identify these unmistakably as retail sales. The direct challenge made by defendant-appellant to the Findings of Fact of Judge Palmieri on this issue of the existence of wholly retail transactions by Parke-Davis has apparently been misconstrued by this Court. There was also an issue as to whether the plaintiff and defendant were in competition as to any class of customer, and whether plaintiff had effectively precluded such competition by its fair trade contracts together with its pricing tactics.

Discussion

As to Point 1 of this Petition, it is literally impossible for Petitioner to comply with the Mandate of the first sentence of Rule 25(b) of this Court.

As to Point 2, Petitioner comprehends Rule 4(a) and Rule 4(b) of this Court to be jurisdictional. Petitioner does not contend that Judge Smith and Judge Hays were without power to decide this matter. Petitioner does urge, however, that having briefed and argued the case to a three-judge panel of this Court, it was entitled to the participation by three Circuit Judges in the decision. The vote of the third Judge in the deliberations may well have been critical as to enlightening and modifying the views of his brethren. Petitioner could very well have had the advantage of a well reasoned dissent, and especially so as to the late Judge Clark. In any event, the outcome of the appeal should not, in all fairness, depend on which Circuit Judges survive the litigation.

Surely, and beyond any argument, the plaintiff's sales as described in Reason 5 above, were retail sales

and they disqualified the plaintiff from enforcing its Fair Trade Contracts under the Supreme Court decision above cited. It is respectfully urged that Judge Clark may well have adopted the Supreme Court construction of such retail activities. In his absence, this Court should decide the question *in banc*.

As to Points 3, 4 and 5, the Court re-defined the substance of defendant-appellant's appeal to effect a wholly verbal resolution of an assumed legal problem. The function of "careful combing of the record below" as set out in defendant-appellant's brief and appendix thereto, which function is an indispensable safeguard to litigants, was not realized on this appeal. Judge Palmieri's challenged findings as to the non-existence of retail transactions were simply not tested as against the record.

This Court then proceeded to define as its principal legal issue a matter that had not been urged by defendant-appellant, namely, if certain sales by plaintiff "were in violation of the act." Defendant-appellant, not having made such claim, is at a loss to determine "the act" the Court had in mind. It is also inconceivable that mere sales by plaintiff, without more, could violate any statute. The question urged by defendant-appellant was quite different. Did certain sales by plaintiff disqualify plaintiff from employing the rights and remedies of the Feld-Crawford Act?

Having misapprehended the thrust of the appeal, the Court then proceeded to test the validity of contractual provisions on the basis of whom these provisions restrained, and to whose benefit these provisions operated. However, defendant-appellant did not challenge the validity of these contractual provisions as such before this Court; defendant-appellant instead urged these provisions on this Court (and the Court

below) to demonstrate conclusively that by these contractual provisions plaintiff itself had acknowledged its competitive status vis-a-vis a defendant-appellant, and that the mere existence of such status, as a matter of economic reality, was fatal to plaintiff's claim to relief.

WHEREFORE, IT IS RESPECTFULLY URGED THAT THIS PETITION FOR REHEARING IN BANC BE GRANTED AND UPON SUCH REHEARING THAT THIS COURT REVERSE THE JUDGMENT OF THE COURT BELOW AND REMAND THE CAUSE TO THE DISTRICT COURT FOR DISMISSAL.

Respectfully submitted,

SAM H. LIPSON,
10 East 40th Street,
New York, New York,
Attorney for Defendant-Appellant-Petitioner

CERTIFICATE OF COUNSEL

I, SAMUEL H. LIPSON, Counsel for Petitioner, do hereby certify that the foregoing Petition for Rehearing *in banc* is presented in good faith and not for the purpose of delay.

SAM H. LIPSON.

Dated: March 5, 1961.

APPENDIX G

Order Amending Opinion and Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PARKE, DAVIS & COMPANY,

Plaintiff-Appellee,

v.

JANEL SALES CORP.,

Defendant-Appellant.

ORDER ON PETITION FOR REHEARING

Sam H. Lipson, New York, N. Y., for defendant-appellant-petitioner.

The first sentence of the second paragraph of the opinion is amended to read as follows:

"The principal issue on this appeal is whether sales by plaintiff to clinics and veterinarians, under provisions of its fair trade contract with retailers exempting sales by retailers to hospitals, clinics, physicians and other named agencies were sales at retail which would deprive plaintiff

of the protection of the so-called 'fair trade' acts."

The petition for rehearing is otherwise denied.

J. J. S.
P. R. H.
U.S.C.J.J.

8 April 1964

Endorsed:

United States Court of Appeals
Second Circuit

Filed April 8, 1964

A. DANIEL FUSARO,
Clerk

APPENDIX H

Denial of Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PARKE, DAVIS & COMPANY,
Plaintiff-Appellee,

v.

JANEL SALES CORP.,
Defendant-Appellant.

Petition for Rehearing in Banc

Sam H. Lipson, New York, N. Y., for defendant-appellant-petitioner.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

8 April 1964

Endorsed:

United States Court of Appeals
Second Circuit

Filed April 8, 1964

A. DANIEL FUSARO,
Clerk

APPENDIX I

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and sixty-four.

Present: HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL, *Circuit Judges*.

PARKE, DAVIS & COMPANY,
Plaintiff-Appellee,

v.

JANEL SALES CORP.,
Defendant-Appellant

A petition for a rehearing in banc having been filed herein by counsel for the appellant

Upon consideration thereof, it is
Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Endorsed:

United States Court of Appeals
Second Circuit

Filed April 8, 1964

A. DANIEL FUSARO,
Clerk